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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 MARGUERITE L. HANIGAN,) Case No. SACV 06-780-JTL
12)
12 Plaintiff,)
13)
13 v.) MEMORANDUM OPINION AND ORDER
14)
14 JO ANNE B. BARNHART,)
15 Commissioner of Social)
15 Security,)
16)
16 Defendant.)
17 _____)

18 PROCEEDINGS

19 On August 21, 2006, Marguerite Hanigan ("plaintiff") filed a
20 Complaint seeking review of the Commissioner's denial of her
21 application for social security disability insurance benefits. On
22 October 11, 2006, the parties filed a Consent to Proceed Before United
23 States Magistrate Judge Jennifer T. Lum. Thereafter, on March 13,
24 2007, defendant filed an Answer to Complaint. On May 18, 2007, the
25 parties filed their Joint Stipulation.

26 The matter is now ready for decision.

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BACKGROUND

On August 5, 2003, plaintiff filed an application for disability insurance benefits. (Administrative Record ["AR"] at 66-68, 333-335). In her application, plaintiff claimed that, beginning on May 1, 2003, limitations regarding movement in her joint, back, and hip prevented her from working. (AR at 75). In a March 23, 2004 letter, the plaintiff claimed the additional impairment of depression. (AR at 132). The Commissioner denied plaintiff's application for benefits both initially and on review. (AR at 49-52, 55-59). Thereafter, plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR at 60).

On June 22, 2005, the ALJ conducted a hearing in Orange, California. (AR at 12-26). Plaintiff appeared at the hearing with counsel and testified. (AR at 15). Stephen Berry, a vocational expert, also testified. (Id.). Joseph Jensen, a board-certified orthopedic surgeon, testified as well. (Id.).

On or about November 18, 2005, the ALJ issued her decision denying benefits. (AR at 12-26). In her decision, the ALJ concluded that plaintiff suffered from severe physical impairments of degenerative joint disease of the cervical and lumbar spine, degenerative disc disease of the lumbar spine, and osteoporosis, but that she did not suffer from any severe mental impairment. (AR at 18, 25). According to the ALJ, however, the severe impairments did not meet or equal any of the criteria contained in the Commissioner's Listing of Impairments, 20 C.F.R. Section 404, Subpart P, Appendix 1. (AR at 25). The ALJ also found that, based upon her residual functional capacity, plaintiff retained the capacity to perform her past relevant work as a clerk typist, receptionist and credit clerk

1 as generally performed in the national economy. (AR at 25).
2 Ultimately, the ALJ found that plaintiff was not disabled pursuant to
3 the Social Security Act. (Id.).

4 On December 21, 2005, plaintiff filed a timely request with the
5 Appeals Council for review of the ALJ's decision. (AR at 10). On
6 June 29, 2006, the Appeals Council affirmed the ALJ's decision. (AR
7 at 4-7).

8 9 **PLAINTIFF'S CONTENTIONS**

10 Plaintiff makes the following claims in the parties' Joint
11 Stipulation:

12 1. The ALJ failed to properly assess the severity of
13 plaintiff's mental impairment.

14 2. The ALJ improperly rejected the residual physical function
15 opinions of the treating physicians.

16 17 **STANDARD OF REVIEW**

18 The Court reviews the ALJ's decision under 42 U.S.C. § 405(g) to
19 determine whether the ALJ's findings are supported by substantial
20 evidence and whether the proper legal standards were applied. DeLorme
21 v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence
22 means "more than a mere scintilla" but less than a preponderance.
23 Richardson v. Perales, 402 U.S. 389, 401 (1971); Desrosiers v.
24 Secretary of Health & Human Servs., 846 F.2d 573, 575-76 (9th Cir.
25 1988).

26 Substantial evidence is "such relevant evidence as a reasonable
27 mind might accept as adequate to support a conclusion." Richardson,
28 402 U.S. at 401. This Court must review the record as a whole and

1 consider adverse as well as supporting evidence. Green v. Heckler,
2 803 F.2d 528, 529-30 (9th Cir. 1986). Where evidence is susceptible
3 of more than one rational interpretation, the ALJ's decision must be
4 upheld. Gallant v. Heckler, 753 F.2d 1450, 1452 (9th Cir. 1984).

6 DISCUSSION

7 A. The Sequential Evaluation

8 The Commissioner has established a five-step sequential process
9 for determining whether a claimant is disabled. 20 C.F.R. §§
10 404.1520, 416.920 (1991); Bowen v. Yuckert, 482 U.S. 137, 140-42
11 (1987). At step one, disability benefits are denied if the
12 Commissioner determines that the claimant is engaged in substantial
13 gainful activity. Bowen, 482 U.S. at 140. At step two, the
14 Commissioner evaluates whether the claimant has a medically severe
15 impairment which significantly limits her physical or mental ability
16 to do basic work activities. Id. at 140-41. Step three requires a
17 consideration of whether the claimant's impairment is equivalent to
18 one of a number of listed impairments that are so severe as to
19 preclude substantial gainful activity. Id. at 141. If the impediment
20 meets or equals one of the listed impairments, the claimant is
21 presumptively disabled. Id. If the impairment is not one that is
22 conclusively presumed to be disabling, step four of the evaluation
23 determines whether the impairment prevents the claimant from
24 performing work she has performed in the past. Id. If the claimant
25 cannot perform her past work, the fifth and final step determines
26 whether she is able to perform other work in the national economy in
27 light of her age, education and work experience. Id. at 142. The

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1 claimant is entitled to disability benefits only if she is not able
2 to perform such work. Bowen, 482 U.S. at 142.

3 **B. Plaintiff's Mental Impairments**

4 Plaintiff claims that the ALJ erred in finding that plaintiff's
5 mental impairments did not constitute a severe impairment. According
6 to plaintiff, the ALJ failed to consider the evidence in the record
7 with regard to the severity of her limitations, particularly the
8 assessments of plaintiff's treating and examining physicians. (Joint
9 Stipulation at 13-15).

10 "An impairment or combination of impairments is not severe if it
11 does not significantly limit [the claimant's] physical ability to do
12 basic work activities." 20 C.F.R. § 404.1521(a). Basic work
13 activities include the "abilities and aptitudes necessary to do most
14 jobs," such as "understanding, carrying out, and remembering simple
15 instructions" and "responding appropriately to supervision, co-workers
16 and usual work conditions." 20 C.F.R. § 404.1521(b)(3)-(4); see also
17 Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996); Yuckert v.
18 Bowen, 841 F.2d 303, 306 (9th Cir. 1988). "An impairment or
19 combination of impairments can be found 'not severe' only if the
20 evidence establishes a slight abnormality that has 'no more than a
21 minimal effect on an individual's ability to work.'" Smolen, 80 F.3d
22 at 1290 (quoting Yuckert, 841 F.2d at 306). The severity inquiry at
23 step two is a de minimus screening device, intended to allow the
24 Commissioner to dispose of groundless claims. Bowen, 482 U.S. at 153;
25 Smolen, 80 F.3d at 1290.

26 Here, the ALJ found that plaintiff's mental impairments did not
27 constitute a severe impairment. Specifically, the ALJ noted that
28 plaintiff's mental impairments resulted in "a mild restriction of the

activities of daily living; mild difficulties in maintaining social functioning; mild difficulties in maintaining concentration, persistence, or pace; and have resulted in no episodes of decompensation." (AR at 18). The ALJ also stated that plaintiff's treating internist, Victor Siew, M.D., did not diagnose plaintiff with depression. (AR at 17). In fact, Dr. Siew diagnosed plaintiff with major depression and anxiety disorder. (AR at 264, 266). Dr. Siew also found that plaintiff was incapable of even a "low stress" work environment and explained, as a basis for his conclusion, that "she is currently being treated for depression, anxiety disorder, and insomnia." (AR at 270). The ALJ, however, did not acknowledge or discuss Dr. Siew's findings regarding plaintiff's depression. Dr. Siew also prescribed medications for plaintiff such as Diazepam¹ and Lexapro² to treat her mental impairments. (AR at 243, 268).

James Benoit, M.D., another treating physician, also diagnosed plaintiff with depression and prescribed various medications for her.³

¹ Diazepam "is used to treat anxiety, acute alcohol withdrawal, and seizures."
<http://my.webmd.com/medical information/drug and herb/default.htm>
 (search "Find A Drug, By Name" for "Diazepam"; follow "Diazepam Oral" hyperlink; then follow "Uses").

² Lexapro "is used to treat depression and generalized anxiety disorder (GAD)."
<http://my.webmd.com/medical information/drug and herb/default.htm>
 (search "Find A Drug, By Name" for "Lexapro"; follow "Lexapro Oral" hyperlink; then follow "Uses").

³ Although Dr. Benoit's progress notes reveal that Dr. Benoit prescribed refills of plaintiff's current medications at the time, which include Paroxetine HCI, it is not clear which specific medications Dr. Benoit prescribed for plaintiff. (AR at 234, 320, 326, 332). Paroxetine HCI is a "selective serotonin reuptake inhibitor (SSRI) used to treat depression, panic attacks, obsessive-compulsive disorder (OCD), anxiety disorders, post-traumatic stress disorder, and a severe form of premenstrual

(continued...)

(AR at 234, 235, 236, 243, 258, 260, 261, 296, 318, 320, 326, 332). Dr. Benoit found evidence of a dysphoric and depressed mood on mental status examination. (AR at 234, 250). Dr. Benoit also found that plaintiff's symptoms, including pain and fatigue, "constantly" interfered with her ability to maintain attention and concentration and, moreover, plaintiff's depression contributed to the severity of plaintiff's symptoms and functional limitations. (AR at 261).

A board certified psychiatrist, Noel Lustig, M.D., Ph.D., evaluated plaintiff as well. On May 20, 2005, Dr. Lustig completed a Comprehensive Psychiatric Evaluation Report based on his examination of plaintiff. (AR at 305-317). In the report, Dr. Lustig diagnosed plaintiff with major depressive disorder and pain disorder. Dr. Lustig found that plaintiff's depression significantly handicapped her. (AR at 317).

On May 23, 2005, Dr. Lustig completed a Psychiatric/Psychological Impairment Questionnaire on the basis of his examination and his review of plaintiff's medical records. (AR at 297-304). In addition to diagnosing plaintiff with major depression, Dr. Lustig assessed plaintiff with a current Global Assessment of Functioning ("GAF") score of 60.⁴ (AR at 297). Dr. Lustig found that plaintiff was

³(...continued)
syndrome (premenstrual dysphoric disorder)."
http://my.webmd.com/medical_information/drug_and_herb/default.htm
(search "Find A Drug, By Name" for "Paroxetine HCI Oral"; follow
"Paroxetine HCI" hyperlink; then follow "Uses").

⁴ "A GAF score is a rough estimate of an individual's psychological, social, and occupational functioning used to reflect the individual's need for treatment." Vargas v. Lambert, 159 F.3d 1161, 1164 n.2 (9th Cir. 1998).

A GAF score between 51 to 60 indicates "[m]oderate symptoms (e.g., flat affect and circumstantial speech, occasional
(continued...)

1 "markedly limited" in her ability to understand, remember, and carry
2 out detailed instructions, to maintain attention and concentration for
3 extended periods, to perform activities within a schedule, to maintain
4 regular attendance, to sustain ordinary routine, to make simple work-
5 related decisions, to complete a normal workday or workweek, and to
6 travel to unfamiliar places or use public transportation. (AR at 299-
7 302, 315-316). Dr. Lustig added that plaintiff would be incapable of
8 even a "low stress" work environment. (AR at 303). Ultimately, Dr.
9 Lustig concluded that plaintiff was totally disabled. (AR at 304).

10 A treating family practitioner, Tim Schmidt, M.D., found that
11 plaintiff was completely disabled and, among other things,
12 experienced severe depression that would require medication and mental
13 health support. (AR at 237, 246). Dr. Schmidt also opined that
14 plaintiff would require counseling and antidepressant medications.
15 (AR at 237).

16 A consultative neurologist, Anthony Ciabarra, M.D., Ph.D., also
17 evaluated plaintiff. Dr. Ciabarra found that "anxiety and depression
18 may be exacerbating her symptoms." Dr. Ciabarra recommended that
19 plaintiff continue taking Lexapro. (AR at 252).

20 At trial, plaintiff testified that anything requiring
21 concentration or memory caused problems at work and in her daily life.
22 (AR 361). Plaintiff also testified that she tried to work at a
23 computer for an hour or two on several occasions and was unable to
24 continue. (AR at 358).

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26 ⁴(...continued)
27 panic attacks) or moderate difficulty in social, occupational, or
28 school functioning (e.g., few friends, conflicts with peers or
co-workers)." Diagnostic and Statistical Manual of Mental
Disorders 34 (4th. ed, rev. 2000).

1 Despite the evidence in the record, however, the ALJ found
2 plaintiff's mental impairment was not severe. (AR at 18). In so
3 concluding, the ALJ rejected the opinions of both Dr. Benoit and Dr.
4 Lustig. The ALJ rejected Dr. Benoit's opinion because the ALJ found
5 that his opinion lacked objective medical findings. (AR at 17). The
6 ALJ also rejected Dr. Lustig's opinion because: (1) Dr. Lustig's
7 opinion lacked objective medical evidence to support his conclusion;
8 (2) Dr. Lustig's opinion contradicted his own clinical findings as
9 well as the record as a whole; and (3) Dr. Lustig only examined
10 plaintiff as part of plaintiff's effort to generate evidence for her
11 appeal and, thus, his opinion was less credible. (AR at 17). As
12 discussed below, the ALJ's bases for rejecting Dr. Benoit's and Dr.
13 Lustig's opinions lack merit.

14 **1. Lack of Objective Medical Findings**

15 The ALJ gave limited weight to Dr. Benoit's and Dr. Lustig's
16 opinions based upon the alleged lack of objective findings in support
17 of their conclusions. (*Id.*). The ALJ further stated that while Dr.
18 Benoit assessed plaintiff with depression and reported an abnormal
19 mental status examination, aside from referring to a dysphoric and
20 depressed mood, he did not report any supporting findings. (*Id.*).
21 With respect to Dr. Lustig, the ALJ also found that Dr. Lustig's
22 opinion lacked factual foundation and was conclusory. (*Id.*). The ALJ
23 noted that the majority of Dr. Lustig's findings were based on the
24 subjective reports of plaintiff and her daughter. (*Id.*).

25 The Ninth Circuit permits an ALJ to rely on an absence of
26 objective findings to reject a treating physician's opinion. Johnson
27 v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995) (inadequate clinical
28 findings provide specific and legitimate basis for ALJ to reject

1 treating physician's opinion); Buckhart v. Bowen, 856 F.2d 1335, 1339
2 (9th Cir. 1988) (proper to disregard uncontroverted treating
3 physician's opinion when he fails to provide objective descriptions
4 of medical findings); cf. Embrey v. Bowen, 849 F.2d 418, 421 (9th Cir.
5 1988) (improper to reject treating physician's opinion where he
6 provided at least some objective observations and laboratory and x-ray
7 testing in addition to subjective opinions).

8 Nevertheless, an ALJ may not reject a treating physician's
9 opinion for lacking supporting clinical data or explanation without
10 first re-contacting the physician to determine whether such supporting
11 clinical data exists. In particular, 20 C.F.R. 404.1512(e)(1), in
12 pertinent part, states:

13 We will first recontact your treating physician
14 or psychologist or other medical source to
15 determine whether the additional information we
16 need is readily available. We will seek
17 additional evidence or clarification from your
18 medical source when the report from your medical
19 source contains a conflict or ambiguity that must
20 be resolved, the report does not contain all the
21 necessary information, or does not appear to be
22 based on medically acceptable clinical and
23 laboratory diagnostic techniques.

24 20 C.F.R. 404.1512(e)(1) (emphasis added). Thus, unless an ALJ
25 complies with his duty to re-contact the treating physician, an ALJ
26 cannot validly cite a lack of clinical data or explanation to reject
27 the treating physician's opinion. See Cleveland v. Apfel, 99 F. Supp.
28 2d 374, 380 (S.D.N.Y. 2000) (remanding case to ALJ for failure to re-

1 contact treating physician before rejecting opinion and stating, "When
2 the opinion submitted by a treating physician is not adequately
3 supported by clinical findings, the ALJ must attempt, sua sponte, to
4 develop the record further by contacting the treating physician to
5 determine whether the required information is available"); see also
6 Corey v. Barnhart, 2002 WL 663130, at *5 (S.D. Ind. March 14, 2002)
7 ("The ALJ discredited Dr. Ciulla's opinion because of the lack of
8 objective findings, and there is no indication in the record that the
9 ALJ recontacted Dr. Ciulla to find out whether he had any findings or
10 other information to support his opinion. The ALJ's failure to do so
11 was error.").

12 Here, the ALJ erred in citing a lack of objective findings as a
13 basis to reject Dr. Benoit's and Dr. Lustig's opinions. First, the
14 ALJ rejected Dr. Benoit's and Dr. Lustig's opinions without first re-
15 contacting them to determine whether, in fact, clinical data existed
16 to support their opinions.

17 Second, the medical findings in the record arguably support Dr.
18 Benoit's and Dr. Lustig's assessments. For instance, Dr. Schmidt
19 found that plaintiff suffered from severe depression that required
20 prescribed medications and mental health counseling. (AR at 237).
21 Dr. Ciabarra not only found that "anxiety and depression may be
22 exacerbating her symptoms" but also recommended that plaintiff
23 continue taking Lexapro. (AR at 252). Most significantly, the fact
24 that all three physicians who treated or examined plaintiff uniformly
25 agreed that plaintiff suffered from mental impairments that more than
26 minimally affected her ability to work is sufficient to meet the de
27 minimus standard that must be applied to the Step Two severity
28 inquiry. See Bowen, 482 U.S. at 153; Smolen, 80 F.3d at 1290.

1 **2. Inconsistency**

2 The ALJ also found that Dr. Lustig's opinions were inconsistent
3 with his own clinical findings and with the record as a whole. The
4 ALJ specifically stated that Dr. Lustig's opinions were "contradicted
5 by his own findings that the plaintiff's attention span, memory, and
6 judgment are only slightly impaired." (AR at 17). The ALJ noted that
7 the marked limitations imposed by Dr. Lustig were inconsistent with
8 plaintiff's capacity, namely her ability to get along with family or
9 friends, talk with relatives on the phone every night, watch
10 television, complete a variety of questionnaires and word process a
11 six-page letter. (AR at 17, 18).

12 Here, the ALJ erred in citing the most benign portions of Dr.
13 Lustig's findings by ignoring Dr. Lustig's other more significant
14 findings. Dr. Lustig found plaintiff to be "markedly limited" in the
15 ability to understand, remember, and carry out detailed instructions;
16 to maintain attention and concentration for extended periods; to
17 perform activities within a schedule; to maintain regular attendance;
18 to sustain ordinary routine; to make simple work-related decisions;
19 to complete a normal workday or workweek; and to travel to unfamiliar
20 places or use public transportation. (AR at 299-302, 315-316).

21 Moreover, the Court is not persuaded that plaintiff's ability to
22 perform certain daily activities and complete several questionnaires
23 for her claim renders her mental impairment non-severe. Plaintiff's
24 ability to get along with others, talk on the phone, watch television,
25 and complete questionnaires does not necessarily contradict the
26 assessments that she may be restricted in terms of work-related
27 activities. Notwithstanding this, the fact that plaintiff was
28 diagnosed with depression and prescribed multiple medications for her

1 mental impairments is sufficient to meet the de minimus standard that
2 must be applied to the Step Two severity inquiry. See Bowen, 482 U.S.
3 at 153; Smolen, 80 F.3d at 1290.

4 **3. Purpose for Which Dr. Lustig's Opinions Was Created**

5 In her decision, the ALJ gave less than substantial weight to Dr.
6 Lustig's opinions. Although the ALJ acknowledged that Dr. Lustig's
7 opinions constituted legitimate evidence and deserved due recognition,
8 the ALJ stated that the "context in which [they were] produced cannot
9 be entirely ignored." (AR at 17). Specifically, the ALJ was
10 referring to the fact that Dr. Lustig's examination was through an
11 attorney referral and the purpose of the examination was in connection
12 with plaintiff's effort to generate evidence for plaintiff's appeal.
13 (Id.).

14 But "in the absence of other evidence to undermine the
15 credibility of a medical report, the purpose for which the report was
16 obtained does not provide a legitimate basis for rejecting it."
17 Reddick v. Chater, 157 F.3d 715, 726 (9th Cir. 1998); see also Lester
18 v. Chater, 81 F.3d 821, 832 (9th Cir. 1995) (purpose for which medical
19 report is obtained is not legitimate basis for rejecting it as report
20 procured by claimant is entitled to no less weight than report
21 procured by Commissioner: "The Secretary may not assume that doctors
22 routinely lie in order to help their patients collect disability
23 benefits") (quotation omitted); cf. Saelee v. Chater, 94 F.3d 520,
24 522-23 (9th Cir. 1996) (rejecting treating physician's opinion that
25 was created at request of claimant because doctor's opinion letter
26 varied from his treatment notes and "was worded ambiguously in an
27 apparent attempt to assist [the claimant] in obtaining social security
28 benefits"). Although an ALJ may consider the purpose for which an

1 opinion was solicited, he cannot rely solely upon the purpose behind
2 the opinion to reject the opinion. Reddick, 157 F.3d at 726
3 ("Evidence of the circumstances under which the report was obtained
4 and its consistency with other records, reports, or findings could,
5 however, form a legitimate basis for evaluating the reliability of the
6 report.").

7 Here, the ALJ erred in citing the purpose for which Dr. Lustig
8 rendered his opinion in rejecting that opinion. Unlike Saelee,
9 nothing in the record suggests that Dr. Lustig ambiguously worded his
10 opinion to assist plaintiff. Nor does the ALJ cite any instance or
11 evidence indicating as much. Accordingly, Dr. Lustig's purpose in
12 creating the opinion did not constitute a legitimate basis for the ALJ
13 to reject his opinion.

14 **C. Reversal and Remand is Appropriate**

15 The choice whether to reverse and remand for further
16 administrative proceedings, or to reverse and simply award benefits,
17 is within the discretion of the Court. McAlister v. Sullivan, 888
18 F.2d 599, 603 (9th Cir. 1989). Remand is appropriate where additional
19 proceedings would remedy defects in the ALJ's decision, and where the
20 record should be developed more fully. Id.; see also Rodriguez v.
21 Bowen, 876 F.2d 759, 763 (9th Cir. 1989); Marcia v. Sullivan, 900 F.2d
22 172, 176 (9th Cir. 1990). An award of benefits is appropriate where
23 no useful purpose would be served by further administrative
24 proceedings, see Gamble v. Chater, 68 F.3d 319, 322-23 (9th Cir.
25 1995), where the record has been fully developed, see Schneider v.
26 Commissioner of the Social Security Administration, 223 F.3d 968, 976
27 (9th Cir. 2000); Ramirez v. Shalala, 8 F.3d 1449, 1455 (9th Cir.

1 1993), or where remand would unnecessarily delay the receipt of
 2 benefits. See Smolen, 80 F.3d at 1292.

3 In this case, the Court finds remand appropriate. On remand,
 4 the ALJ must determine whether the severe impairments meet or equal
 5 a listed impairment. At the step two inquiry, the ALJ must consider
 6 the combined effect of all of plaintiff's impairments on plaintiff's
 7 ability to function, without regard to whether each alone was
 8 sufficiently severe. The ALJ must then determine whether the
 9 impairment prevents plaintiff from performing work she has performed
 10 in the past. If plaintiff cannot perform her past work, the ALJ must
 11 finally determine whether she is able to perform other work in the
 12 national economy in light of her age, education, and work experience.⁵

14 ORDER

15 The Court, therefore, VACATES the decision of the Commissioner
 16 of Social Security Administration and REMANDS this action for further
 17 administrative proceedings consistent with this Memorandum Opinion and
 18 Order.

19 DATED: July 18, 2007

20 _____ /s/
 21 JENNIFER T. LUM
 22 UNITED STATES MAGISTRATE JUDGE

23 _____
 24 ⁵ In the Joint Stipulation, plaintiff also argues that the
 25 ALJ improperly rejected the residual physical function opinions
 26 of the treating physicians. As explained above, however, the
 27 ALJ's failure to find that plaintiff suffers from a severe mental
 28 impairment constitutes sufficient reason to remand this case.
 Depending on the outcome of the proceedings on remand, the ALJ
 will have an opportunity to address plaintiff's other arguments.
 In any event, the ALJ should consider all the issues raised by
 plaintiff in the Joint Stipulation when determining the merits of
 plaintiff's case on remand.